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VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C.

Ex Parte

**Re: Implementation of Section 621(a)(1) of the Cable
Communications Policy Act of 1984, as Amended by the Cable
Television and Consumer Protection and Competition Act of 1992;
MB Docket No. 05-311**

Dear Ms. Dortch:

On behalf of SureWest Communications ("SureWest"), I am filing this *ex parte* letter to request that as part of the pending rulemaking in the above-captioned proceeding, the Commission prohibit multichannel video programming distributors ("MVPDs") from executing new, or enforcing existing, agreements for exclusive access to Multiple Dwelling Units ("MDUs") and other real estate developments. These agreements are typically used by incumbent cable TV operators to undercut the competitive market for video services, and to deprive residents of MDUs and other developments of the ability to choose their provider of multichannel video services, as well as other telecommunications services now commonly packaged with multichannel video services. Such results are contrary to long-standing Commission and Congressional policies designed to maximize competition in the provision of video services and consumer access to multiple media voices. Furthermore, the anti-competitive impact of these exclusive agreements is exacerbated by delays in the franchising process that allow incumbent cable TV operators to continually "lock up" more MDUs while the competitive MVPD is trying to get a franchise.

Background – SureWest Communications

With over 90 years of providing service in Northern California, SureWest and its family of companies represent an integrated network of advanced communications products and services. While its origins are as an incumbent local exchange carrier providing basic services, SureWest's bundled offerings now include an array of advanced digital video, high-speed Internet, local and long distance telephone and PCS wireless services. SureWest's fiber-to-the-premise IP-based network features high definition video¹ and Internet speeds of up to 20 Mbps. SureWest provides these digital multichannel video ("MV") services over a number of different IP platforms using different technologies. SureWest's fiber-to-the-premise MV service provides over 260 channels along with advanced video-on-demand and pay-per-view. All of SureWest's MV services are well-accepted by consumers. SureWest's MV services are typically marketed as part of a package of services that includes voice and broadband data services ("Triple Play"). Currently, over 17,000 customers take MV service from SureWest, either alone or in combination with other services.

The Problem of MDU Exclusive Access Agreements

As a relatively new entrant to the MV service market, companies like SureWest must overcome numerous economic barriers in order to succeed. SureWest is often the fourth entrant in a particular area. At a minimum SureWest must compete against the major national incumbent cable operator in the area -- Comcast. Nevertheless, SureWest believes that in a fairly competitive market where consumers can freely choose among all providers of MV services, the quality of its service and products will allow it to succeed, and consumers will benefit from such competition. Consistent with that approach, in the pending *NPRM* in this proceeding, the Commission stated that while most consumers have choice between a cable TV operator and two direct broadcast satellite providers, even "greater competition in the market for multichannel video programming is one of the primary goals of federal communications policy. Increased competition can be expected to lead to lower prices and more choices for consumers"²

In the meantime, the Commission has primarily focused in this proceeding on the franchising process as a barrier to competition, the Commission should also consider another major barrier to competition: MDU exclusive access agreements. These agreements are used primarily by incumbent cable TV operators to "lock up" large groups of customers by preventing them from being able to choose their preferred MVPD. The Commission has previously recognized the anti-competitive implications of

¹ In 2005, SureWest became the first broadband service provider in the U. S. to offer HDTV over an IP network.

² Notice of Proposed Rulemaking, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as Amended by the Cable Television and Consumer Protection and Competition Act of 1992, 20 FCC Rcd 18581 (2005) ("NPRM").

exclusive access contracts,³ but has failed to take action because at that time (2003) it believed that there was “insufficient evidence in the record as to “the extent to which exclusive contracts have been utilized” as well as whether “such contracts have thwarted alternate providers’ entrance into the MDU market....”⁴ Below, SureWest adds to the record on the extensive presence of MDU exclusive access contracts, and the anti-competitive effects of those contracts.

It also should be noted that consideration of MDU exclusive access agreements is relevant in this proceeding. That is, delays in the process by which competitors to the incumbent cable TV operator obtain cable franchises give the incumbent extra time to “lock up” additional MDUs. Indeed, there is evidence in the record that incumbent cable operators increase their efforts to obtain exclusive rights to MDUs when a competitor applies for a franchise.⁵

The Presence and Impact of MDU Exclusive Access Agreements in the SVC Service Area

SureWest’s network currently passes MDUs with a total of 40,487 units which could be served with SureWest MV services. However, over 10,600 of those units are in MDUs which are locked into exclusive access agreements which bar SureWest from providing and/or marketing MV services to residents in those units. Thus, SureWest is barred from serving over 26 percent of the MDU units its network passes. Comcast is the MVPD party to agreements that represent approximately 80 percent of these “locked up” MDU units. While none of the MDUs have shared copies of the agreements with SureWest at this time, statements from the owners of the MDUs suggest that most of the agreements range from 3 to 12 years in length, with a few being perpetual.

The common result of the presence of MDU exclusive access agreements is that residents of the MDUs are denied the opportunity to take service from the MVPD of their choice. Here are two examples of the situation where consumers wanted to take service from SureWest, but were barred from doing so:

³ Report and Order and Second Further Notice of Proposed Rulemaking, Cable Home Wiring, 13 FCC Rcd 3659, 3754 (1997) (“*Cable Home Wiring R&O*”).

⁴ First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1369 (2003).

⁵ See, *Ex Parte* Letter of Verizon, MB Docket 05-311, filed July 6, 2006. (“*Verizon Ex Parte*”).

Stone Ridge Apartments – 230 unit apartment community in the City of Roseville

SureWest contacted Stone Ridge about offering Digital TV services to their residents, and in January of 2006, Stone Ridge's property management service, FPI, invited SureWest to offer services. On January 27, 2006, SureWest held an event on-site, with FPI's permission. Over 20 residents agreed to purchase SureWest MV service, as they liked SureWest's programming offering and the pricing for Digital MV services, in addition to the price breaks received for bundling MV with telephone and DSL services. However, on February 11, 2006, SureWest received an email from FPI, stating that FPI and the owner of Stone Ridge had made an oversight and subsequently realized that there was already an exclusive agreement with Comcast for TV and internet services, preventing SureWest from selling MV and DSL services to the residents of Stone Ridge. FPI prevented SureWest from making installations for any of the customers. As a result, SureWest was forced to cancel these orders. A number of the residents subsequently vigorously complained about this situation to SureWest.

Westlake Villas – 285 unit condominium community in the City of Sacramento

At the time it was being built, the developer of this MDU (Meer Capital) signed an exclusive agreement with SBC Home Entertainment for internet and MV services. This agreement includes a revenue sharing program. This information was not fully disclosed to the residents or Home Owners Association ("HOA") of Westlake Villas. SureWest approached the residents of Westlake Villas with mailings in November 2005 and February 2006, informing them that SureWest would like to be a non-exclusive option for Digital MV services. SureWest received 15 phone calls for service from these residents. The residents who called were not pleased with being limited in their choices and were not satisfied with the service from SBC. It was then disclosed to the HOA and residents that there was a pre-existing exclusive agreement with SBC Home Entertainment. SBC Home Entertainment threatened a penalty in excess of \$100,000 for release from the agreement to allow another service provider in the complex. Until this situation is resolved, SureWest can not offer services to the residents of Westlake Villas.

In sum, SureWest's experience is that the presence of MDU exclusive access agreements are having a significant impact on consumer choice and competition in MDUs.

Commission Authority to Regulate MDU Access Agreements

At times when the Commission has addressed MDU agreements, one issue considered was the statutory basis for such regulation by the Commission. In a recent *ex parte* filed in this proceeding, Verizon provided an extensive analysis showing that the Commission had authority to regulate MDU agreements under Section 628 of the Communications Act.⁶ SureWest agrees with and supports Verizon's analysis, but also takes this opportunity to briefly suggest additional bases for Commission authority in this area.

Statutory authority for the Commission to adopt rules prohibiting MVPDs from executing new, or enforcing existing, agreements for exclusive access to MDUs and other real estate developments, can be found in Sections 4(i) and 303(r) of the Communications Act.⁷ The Commission properly relied on these provisions to authorize rules governing the transfer of inside wiring among MVPDs,⁸ an issue related and similar to that of contracts for service in MDUs.

Statutory authority for Commission regulation of MDU access agreements can also be found in Section 207 of the Telecommunications Act of 1996, which gives the Commission the authority to regulate private contracts that impede the ability of residents of MDUs to receive MV services using technologies employed by competitors of incumbent cable TV operators (DBS and "MMDS" services).⁹ The Commission has previously used this authority to invalidate portions of private covenants and contracts that prevent MDU residents from employing over-the-air reception antennas to receive

⁶ *Verizon Ex Parte* at 5-6.

⁷ These statutory provisions generally authorize the Commission to perform any and all acts, and make such rules and regulations not inconsistent with the Communications Act, as necessary to carry out the Commission's functions and/or the provisions of the Act. As noted above, the *NPRM* in this proceeding states that "greater competition in the market for multichannel video programming is one of the primary goals of federal communications policy." Such policy is set forth in Section 601(6) of the Act, which states that one of the purposes of Title VI is to "promote competition in cable communications." Statutory expression of the goal of competition in MV services is also expressed in Section 621(a)(1) of the Act, which forbids franchising authorities from awarding exclusive cable franchises, or unreasonably refusing to award additional competitive franchises.

⁸ Report and Order and Second Further Notice of Proposed Rulemaking, Cable Home Wiring, 13 FCC Rcd 3659 (1997), at paras. 83-101, 218.

⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 207, 110 Stat. 114, *codified at* 47 U.S.C. Sec. 303.

competitive MV services.¹⁰ SureWest requests that the Commission promote competition in wireline MV services in a manner similar to the way it promoted competition in wireless MV services.

Conclusion

Competition can only thrive where customers have the ability to choose their service provider. SureWest has directly experienced the fact that the enforcement of agreements for exclusive access to MDUs and other real estate developments is contrary to Commission and Congressional policies designed to increase competition in the provision of MV services. SureWest thus requests that as part of the pending rulemaking in the above-captioned proceeding, the Commission prohibit MVPDs from executing new, or enforcing existing, MDU exclusive access agreements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul Feldman", written over a horizontal line.

Paul J. Feldman
Counsel for SureWest Communications

¹⁰ Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, Preemption of Local Zoning Regulation of Satellite Earth Stations, Restrictions on Over-the-Air Reception Devices, 11 FCC Rcd 19276 (1996).